THE TORONTO ADMIRALTY DISTRICT.

THE DUNBAR AND SULLIVAN DREDGING COMPANY AND M. SULLIVAN..... } PLAINTIFFS:

1907
Nov 22.

AGAINST

THE SHIP "*MILWAUKEE.*"

Admiralty—Arrest of ship out of jurisdiction—Jurisdiction of the Admiralty Court considered— Waiver of protest.

The giving of a bond to release a vessel under arrest constitutes a waiver of any objection that might be taken to the jurisdiction of the Court. The *D. C. Whitney* (38 S. C. R. 303) distinguished.

THIS was a motion in Chambers to set aside the writ of summons and warrant issued in this action, on the ground, first, that at the time of the issue of the writ and warrant the ship seized was not in Canadian waters, and secondly, that following the *D. C. Whitney*, 38 S. C. R. 303 the Court had no jurisdiction.

Further facts and argument of counsel appear in the reasons for judgment.

The motion was argued before His Honour Judge Hodgins at the city of Windsor on the 3th day of October and 8th day of November, 1907.

F. A. Hough, for Plaintiffs.

A. R. Bartlett for Defendant.

HODGINS, L. J. now (November 22nd, 1907), delivered judgment.

This action is brought by the plaintiffs as owners of the "Derrick Scow Number Seven" against the defendant ship *Milwaukee* for damages occasioned by a collision between the ship and scow in the Canadian channel of the

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Detroit River, and within the territorial jurisdiction of this Court, on 14th December 1906, causing the sinking of the scow. The writ of summons and warrant of arrest were issued on the 25th July, and were served and executed on the 22nd August, and appearance "under protest" was entered on the 23th August 1907. A bond was given under the rule (not under protest) on the 7th September, but was not finally completed until the 26th October, 1907.

The seizure of the defendant ship was made as stated in the affidavit of Maxime Laporte, who executed the warrant of arrest as Deputy for the Sheriff of the County of Essex; "I boarded the defendant ship for the said purpose in the Canadian channel of the Detroit River about one hundred yards above the head of Bois Blanc Island, and effected the service of seizure aforesaid, when the ship was between the said Island and the Town of Amherstburg. The defendant ship then proceeded in the said channel to the lower end of the said Island, when she came to anchor in the waters known as Callams Bay, a small inlet or anchorage in the Township of Malden in the County of Essex, below the said Town of Amherstburg, were arrangements were made for bonding the ship. After the bond had been given. I was instructed by the plaintiffs' solicitor to release the ship, and I returned to where she lay at anchor for that purpose; withdrew the man I had left in charge and permitted her to proceed on her course. During the whole time that I was on the defendant ship in fullfillment of my duties, and while she lay at anchor in Callams Bay aforesaid the said ship was wholly in Canadian waters." His oral evidence is much to the same effect.

The affidavit of Frank D. Osborne, master of the defendent ship, states; "At the time the said ship *Milwaukee* was arrested she was in motion in passing through the channel between Bois Blanc Island, and the Canadian

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shore, or thereabouts, on her voyage between Chicago and Buffalo, having cleared from Chicago for the said last mentioned port,—both of said ports being ports of the United States of America. The said ship *Milwaukee* was not entering, lying at, or bound for, any Canadian port; but while she was in motion proceeding on the said voyage, she was hailed by a tug having on board the officer who made the seizure in this action; and it was in consequence of the demand of such officer who purported to be carrying into effect tho process of this Honourable Court, that I submitted to the arrest of the said ship."

The parties agree that the question of the jurisdiction of this Court to try the action be first disposed of.

This case brings up some of the questions considered by the Supreme Court in the case of the *Ship D. C. Whitney* v. *The St. Clair Navigation Company*, (1) reversing the judgment of this Court which is reported in 10 Ex. C. R. 1. But in that case no evidence was given, nor argument advanced, at the trial before me, either that "the ship was in motion on her voyage," or "had come to anchor;" and there seems to have been a difference of opinion respecting either fact in the Supreme Court. See pages 308, 309 and 324.

The water territory within which the alleged collision occurred, and within which the arrest was made, was declared by several Statutes, from the Upper Canada Act of 1831, c. 2 s. 1, down to R. S. O. (1897), c. 3, s. 7, (if the Proclamation of the 16th July, 1792, or the Upper Canada Acts of 1798, c. 5, or of 1818, c. 10, had not done so), to be part of the county of Essex, by the following re-enactment: "the limits of all the townships lying on the * * * River Detroit * * * shall extend to the boundary of the Province in such * * * river, in prolongation of the outlines of each township respectively."

(1) 38 S. C. R., 303.

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By the same Act of 1831, s. 2, jurisdiction was vested in the Upper Canada Courts to try all crimes and offences committed in, or upon, the said waters; and that they should be tried within any district lying adjacent to such waters;—which jurisdiction has been continued down to R. S. C. (1906), c. 146, s. 585.

The extent of the exceptional jurisdiction of Admiralty Courts appears to be little known; nor has the statutory jurisdiction conferred upon the Canadian courts by the sovereign authority in control of the Dominion of Canada been as yet clearly or authoritatively defined; and, so perhaps it may be conceded that a little juridicial and statutory literature on both jurisdictions, may be explanatory and useful for the guidance of the profession in future cases.*

Subsequent to the Merchant Shipping Act of 1854, s. 521, Imp. (now s. 685 of the Act of 1891), it was held in The *Queen* v. *Sharp*, (1859), 5 Pr. R. 135, that so much of the boundary lakes and rivers as were within the Canadian side of the International Boundary line, were bodies of water "over which the Admiralty jurisdiction extended;" and that by the Imperial Act of 1849, c. 96, s. 1, there was jurisdiction in the Canadian Courts to take cognizance of offenses, although committed within American waters. And that this jurisdiction was reciprocal in Admiralty matters in the American Courts, was sustained by the Supreme Court of the United States in *United States* v. *Rodgers*, (1). And in *Rex* v. *Meikleham*, (2) it was held that the laws of Ontario extended to the International bountary line of the Provincial waters, and also that where the Legislature had intended to disregard, or interfere with, a rule of International Law, the Courts were

*JUDGE'S NOTE:—Mr. Justice Story has apparently furnished a precedent for this in stating in his judgment *Re Bellows and Peck*, (1844), 3 Story, p, 441, "It may be proper to make a few observations upon the practice which ordinarily regulates the action of the District Court."

(1) (1893), 150 U. S. 249. (2) (1905), 11 O. L. R. 366.

bound to give effect to its enactments. This doctrine was also broadly affirmed by the Judicial Committee of the Privy Council in the Conception B case, a bay 20 miles wide at its sea-mouth,—that where the British Parliament had by its Acts declared that bay to the part of British territory, and subject to the Legislature of Newfoundland, such legislation was conclusive on British tribunals; *Direct United States Cable Co.* v. *Anglo American Telegraph Company*, (1)*

To these authorities may be added the following clause (s. 685) of the Merchant Shipping Act. of 1894, which by s. 712, is declared "to apply to the whole of Her Majesty's Dominions" and which is a re-enactment of s. 521 of the Merchant Shipping Act. of 1854.

"Where any district within which any Court or Justice of the Peace, or other Magistrate, *has jurisdiction* either (*a*) under this Act, or (*b*) under any other act, or (*c*) at common law, *for any purpose whatever*, is situate on the coast of any sea, or abutting on, or projecting into, any bay, channel, lake, river, or other navigable water; every such Court, Justice, or Magistrate, *shall have jurisdiction over any vessel being on or lying, or passing, off that coast, or being in, or near that bay, channel, lake river, or navigable water; and over all persons on board that vessel, or for the time being belonging thereto*, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the Court, Justice, or Magistrate."

Some of the statutory jurisdiction of the British Courts over foreign ships under the above Act, may be classified as follows:

(1) Sec. 418. The collision regulations "shall be observed by all foreign ships within British jurisdiction"; and

(1) (1877) 2 A. C. at page 420.

*JUDGE'S NOTE:—This decision disregards the generally accepted doctrine of International Law that says of six marine miles width at their mouth, measured from headland to headland are wholly part of the territory of the sovereignty to which both headland shores belong.

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"foreign ships shall, so far as respects the collision regulations, * * * be treated as if they were British ships".

(2) Sec. 504. "Where any liability is alleged to have been incurred by the owner of a * * * foreign ship in respect of loss of, * * * or damage to, vessels or goods, and several claims are made, or apprehended, in respect of that liability, then the owner may apply, * * * in a British possession, to any competent court, and that court may determine the amount of the owner's liability, and may distribute that amount ratcably among the several claimants".

(3) Sec. 424 enacts that whenever the Government of any foreign country is willing that the British Collision Regulations should apply to the ships of that country, the Crown may by an Imperial Order-in-Council, "direct that those regulations and provisions shall, subject to any limitation of time, provisions and qualifications, contained in the order, apply to ships of the said foreign country, whether within British jurisdiction or not; and that such ships shall, for the purpose of such regulations and provisions be treated as if they were British ships". Orders-in-council have been made under this section, and will be quoted later on.

(4) Sec. 684: "For the purpose of giving jurisdiction under this Act, every (criminal) offence shall be deemed to have been committed, and every (civil) cause of complaint to have arisen, either in the place in which the same actually was committed, or arose, or in any place in which the offender, or person complained against, may be.

The jurisdiction "under any other Act," may be found in the Imperial Act of 1840, c. 65, s. 6: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of * * * damages received by any ship, or sea-going vessel, * * * and to enforce the judgment thereof, whether such ship or vessel may have been *within the body*

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*of a county, or upon the high seas, at the time when the * * * damage was received.*" By the Imperial Act of 1849, c. 96, s. 1, a jurisdiction was conferred upon Colonial Courts to try crimes or offences committed on the sea, or in any haven, river, creek, or place, where the Admiral had jurisdiction, as if such offences had been committed within the local jurisdiction of the courts of such colony. And in the Imperial Admiralty Act of 1861, c. 10, a special jurisdiction which may be said to be world-wide is conferred by s. 7, which enacts: "the High Court of Admiralty shall have jurisdiction over any claim for damages done by any ship." The term "any ship" in the above clauses, and in s. 685, applies to a foreign ship in any British port, just as much as to an English ship: "Where the words are general, and are not such as to cause a conflict of laws, then there is no reason why such provisions should not apply to foreign ships also." *Reg* v. *Stewart* (1).

These jurisdictional powers have been conferred upon this Admiralty Court (being a court situate on the "navigable waters" of lakes and rivers described in s. 585 of the Merchant Shipping Act, 1894;" and also by s. 2 of the Colonial Courts of Admiralty Act of 1890, (Imp.) which reads: "The jurisdiction of a Colonial Court of Admiralty, subject to the provisions of this Act, shall be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute, or otherwise; and the Colonial Court of Admiralty may exercise such jurisdiction in like manner, and to as full an extent, as the High Court in England, and shall have the same regard as that Court to International Law, and the comity of nations." And as if to make this enlarged jurisdiction more clear, sub-section (*a*) of section 2, provides that: "Any enactment in an Act of the Imperial

(1) [1899] 1 Q. B. at p. 970.

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Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales."

And by sub-section 4, the exercise of jurisdiction by a Colonial Court "in respect of matters *outside* the body of a County, or other like part of a British possession. "That jurisdiction shall be deemed to be exercised under this Act, and not otherwise." See further Howell's Admiralty Law, Canada, p. 207.

Pursuant to sec. 424 above referred to, the Government of the United States having signified its consent, as provided in that section, an Imperial Order-in-Council was approved on the 7th July, 1897, declaring that thereafter the British regulations respecting collisions should apply to *all ships of the United States, whether within British jurisdiction or not.* Under the prior Act of 1854, a similar order-in-council had been approved on the 9th January, 1863; and on the 30th November, 1864, another order-in-council made the latter order-in-Council apply to ships of the United States navigating the inland waters of Canada. See "Statutory Rules and Orders-in-Council," (Imp.) v. 4, pp. 1168-1174; Maude and Pollock's Law of Merchant Shipping, p. 586, note (*j*) and Appendix pp. 36–46; Abbott on Shipping, (14th ed.) pp. 1201, note (o), and p. 1280, note (s).

Under this section, and the consent given by the Government of the United States, as well as under sec. 418, and assuming the alleged collision in this case to have taken place in Canadian waters, the alleged offending vessel of the United States is to be treated as if she were a British ship in the jurisdictional proceedings taken against her in this Admiralty Court. And this jurisdiction appears to be confirmed by the case of *Pieve Superiore*, (1)

(1) (1874) L. R. 5 P. C. at p. 491.

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where it was said ; "If the jurisdiction of the Court of Admiralty over the claim once attached, that Court, in their Lordships' opinion, would be competent, at any subsequent time, to entertain a suit either *in personam or in rem*, by the arrest of the ship, whenever it came within reach of its process." And in *the Girolamo* (1); it was held that foreign vessels and foreign persons are liable to the local municipal laws of the country for acts done within the local jurisdiction of its Courts.

Counsel for the defendant ship relies for a defence on the statements in the affidavit of Frank D. Osborn, recited above, and on the seventh article of the Ashburton Treaty of 1842, which reads as follows; "It is further agreed that the channels in the River St. Lawrence, on both sides of the Long Sault Rapids, and of Barnhardt Island, the channel of the River Detroit on both sides of the Island of Bois Blanc, and between that island and the American and Canadian shores, and all the several channels and passages between the various Islands lying near the junction of the River St. Clair, with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties." And as to other free passages, through the water communications, and land portages between Lake Superior and the Lake of the Woods, see Article II.

By Article XXVI of the Washington Treaty of 1871, a further portion of the River St. Lawrence was declared "for ever to remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privileges of free navigation." Comparing these Articles, it cannot be claimed, I think, that the vessels of the United States, sailing over the 1871 Treaty portion of the St. Lawrence River, are subject to the jurisdiction

(1) (1834) 3 Hagg. Ad. 169.

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of the Canadian Statute Law and Courts. But when sailing over the 1842 Treaty portion of the river, that they are immune from such jurisdiction. The Treaty of 1871 affirms a long established doctrine of International Law which must he held to be applicable to both Treaties;—That no independent sovereignty is to be construed to contract itself, by implication, out of its fundamental sovereign rights, nor out of "one of the highest rights of sovereignty, viz.; the right of legislation;" *Hall's International Law*, 5th Ed. pp. 339, 340. And per Lord Mansfield, C.J.; "The Law of Nations, to its full extent, is part of the law of England," *Triquet* v. *Bath*, (1).

It has long been a doctrine of International law that the territory and jurisdiction of an independant sovereignty are co-extensive. And it is a constitutional rule that to its courts and judges certain of the juridicial powers of the sovereignty are delegated, to be exercied within the territorial boundaries of such sovereignty. And it has long been a doctrine of British law that when the jurisdiction of its courts of justice, and of their juridicial authority have been once established by Legislative Acts within such territorial boundaries, or within certain described portions of them, such jurisdiction and authority cannot be suspended, or lessened, or abrogated by the Crown, (unless so authorised by Statute) but only by similar legislative acts of the Parliament, or other legislative authority, by which such jurisdiction and authority had been established.

Mr Justice Story has defined the distribution of the powers of sovereignty to "include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers, upon which all Governments are supposed to rest, viz: the Executive, the Legis-

(1) 3 Burr. 1478.

lative and the Judicial. "Constitution of the United States" par. 518.

In the British system of government, the Legislative power is supreme: "Bracton and Fleta both affirm: *Rex habet superiores in regno, deum et legem. Item, curiam suam*" (1) Lord Campbell's Lives of the Chief Justices, v. 1, p. 131.

And, commenting on the British treaty-making power, Halleck's International Law says, as to certain classes of treaties: "Nevertheless the treaty binds nobody till its provisions are enacted by law; and a treaty cannot he pleaded in the courts, unless confirmed by an Act of Parliament" (2).

A different constitutional rule prevails in the United States, for by its Federal constitution all treaties with foreign nations take rank as statute law by Article VII, which reads: "This constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall he made, under the authority of the United States, shall be the supreme law of the land".

"Where a Treaty is the law of the land, and as such affects the rights of parties litigating in the United States' Courts, that Treaty is as much to be regarded by the Courts as an Act of Congress": Per Marshall, C. J., in *United States v Schooner Peggy*, (3).

The seventh Article of the Ashburton Treaty of 1842 was construed by one of the United States Appellate Courts in the case of a criminal offence committed on the Canadian side of the Detroit River in 1859; and, quoting the Article, the Court said: "This is no more than the innocent use of the water, without any surrender of jurisdiction, according to the principles of International Law; except that the latter (innocent use), being an im-

(1) 12 Co. Rep. 65. (2) 3rd. Ed. vol. 1, page 281.
(3) (1801), 1 Cranch, (U. S.), 110.

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perfect right, was subject, in many respects, to the will of the nation in which such channels may be; and therefore, without treaty, might be refused to either. Certainly it cannot be claimed that the provision can detract from, in any respect, the entire and exclusive jurisdiction which each party had, in its own water, over persons there being or passing, any more than if this right of passage had been given to either over the lands of the other." "The right of passage by land", (referring to the land portages described in Article II, "or water, for commercial purposes, cannot, I think, in any case, be construed as a surrender of jurisdiction. It is too clear to admit of any serious doubt. that there is nothing in any of these Articles depriving the British Government of that complete and exclusive jurisdiction over that part of the lakes and rivers on her side of the boundary line, which any nation may exercise upon the land within her acknowledge territorial limits": *People v Tyler.* (1) The above Court held that it had no jurisdiction to try crimes committed outside its jurisdiction, and within the Canadian waters; but the Supreme Court of the United States, in 1893, without reversing the above interpretation of the Treaty, held that both American and Canadian Courts has jurisdiction to try crimes committed within the territorial waters of either country: *United States v Rodgers* (2).

And in the diplomatic discussion respecting the reciprocal fishing privileges to American and Canadian fishermen under the reciprocity Treaty of 1854, the American view was thus stated by Mr Secretary Mercy in 1853; "By granting the mutual use of their inshore fisheries, neither party has yielded its rights to civic jurisdiction over a marine league along its coasts. Its laws are as obligatory upon its citizens, or subjects of the other, as upon its own". U. S. Foreign Relations, 1880-1, page 572.

(1) (1859) 7 Mich. (3 Cooley) p. 161 and 233.

(2) (1893), 150 U. S. 249.

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The seventh article of the Ashburton Treaty of 1842, conceding the free navigation through the Canadian water-ways, was never ratified by any Legislative Acts of Great Britain, (see Imperial Act of 1848, c. 76); nor of Canada, (see Canada Act of 1849, c. 19); nor of the United States, (see Act of Congress of 1848, c. 167).

These articles of 1842 and 1871, practically confirmed the privileges of free navigation, or innocent passage, as defined by the Roman law: "*Riparum usus publicus est jure gentium, sicut ipsius fluminis.*" Dig. 1, 8, 5 pr.

And although generally classed as an "imperfect right," Wheaton's International Law says: "It was a right as real as any other right; and where it is to be refused, or to be shackled with regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us (United States), it would then be an injury of which we should be entitled to demand redress." "Nor was the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect of the navigation of the European rivers, sufficient to prove that the origin of the right was conventional, and not national," (pages 306 and 313).

But the supreme authority as to the effect of a treaty on the jurisdiction of British Courts, is that of the Judicial Committee of the Privy Council in the case of *Damodhar Gordhan* v. *Deoram Kanji* (1), where by a convention, or transfer made by the Indian Government, with the sanction of the Secretary of State for India in Council, of certain British territories in India to a native prince, and a Government Proclamation excluding such territories from the jurisdiction of the British laws and courts, theretofore established within them, it was held that it was beyond the powers of the British Crown, in time of peace, to make any cession of British territory, or to exclude it from the jurisdiction of the British courts

(1) [1876] 1 A. C. 332; s. c. 3 Ind. App. 102.

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therein, or to substitute for it any other extraordinary jurisdiction, without the concurrence of the Imperial Parliament.

And this decision conforms to an old maxim affecting the prerogative, which declares that "the king cannot grant to any one that he shall not be impleaded; or, if a man does a trespass to me, that I shall not have an action against him." 16 Viner's Abridgement, p. 561.

The cession of Heligoland to Germany, was confirmed by the Imperial Act of 1890, c. 32; and the cession to France of certain British territories in Africa, and the concession of certain fishing privileges in the Newfoundland coast-waters, were confirmed by the Imperial Act of 1904, c. 33, and are parliamentary precedents in support of the judgment of the Judicial Committee of the Privy Council.

As supplementary to the general question, it may be proper to quote the words of Sir V. Page Wood, V.C., in *General Iron Screw Collier Company* v. *Shurmanns* (1). "If within the territory over which this country has the right to legislate, the legislature has expressly exempted all foreign vessels from the operation of the law, not only would the beneficial effect of the Merchant Shipping Act be diminished, but British shipping would be positively prejudiced for the benefit of foreigners." And, referring to s. 527 of the Act of 1854, (now s. 688 of the Act of 1894), he said that there is very strong evidence of intention in that section which directs that whenever any foreign ship which has done damage to any British ship, shall come within three miles, the British ship-owner shall be entitled to arrest that vessel, and bring her into harbour to recover the damages that have accrued; *i.e.* to arrest her while in motion or "passing off" the coast within the three miles. And in argument Mr. Hugh Cairns stated that the sections of the

(1) [1860] 1 J. & H. 195.

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Merchant Shipping Act he quoted (one being s. 521), authorized the seizure of foreign ships within three miles of the coasts," (p. 182).

And it may be instructive in seeking for a judicial interpretation of the expression "ship is found", in sec. 688 of the Merchant Shipping Act of 1894, to refer to a case in the Supreme Court of the United States in which that Court had to deal with the unlawful seizure of an American merchant vessel within the territorial jurisdiction of a foreign sovereign power, and the bringing of her within the jurisdiction of a Court of the United States, which seizure was an offence against that foreign sovereign power, could only be adjusted by the political departments of the two governments, but in respect of which the courts of the United States could take no cognizance. The Supreme Court held that it could not connect that international trespass with the subsequent arrest of such vessel, when seized within the jurisdiction of the United States, under the process of one of its civil Courts, so as to annul the legal proceedings against the vessel; and the condemnation of such vessel by the United States Court was therefore affirmed; *Ship Richmond v United States* (1). And as to the expression "person complained of *may be*", and "person is *found*", in sec. 686, see *Regina v Sattler* (2), and *Ex parte Ker* (3).

But while courts of justice may be without jurisdiction to investigate and adjudicate upon the unlawful proceedings of outside parties, of officers of ships, in arresting alleged offending ships beyond, or within, the civil or criminal jurisdiction of such courts; or the unlawful abduction or kidnapping of alleged offenders, and by such means bringing such ships or offenders within the locality of the court which has jurisdiction over the offences charged, it will investigate and declare invalid any unlaw-

(1) (1815), 9 Cranch, (U. S.) 102. (2) (1858), 27 L. J. M. C. 50; (3) (1883), 18 Fed. R. 167

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ful proceedings committed by any of its officers in the execution of the process of such court, and so that any illegality or violence committed by them under its process, which would taint and degrade the administration of justice, should be promptly excised from its records, and disallowed.

This jurisdiction was illustrated in the case of *Borjesson v Carlberg* (1), which was, as stated by the Lord Chancellor, "purely and simply a question of practice", or in other words, "procedure".

It appeared that under a warrant to arrest a Norwegian vessel, which had improperly broken her previous arrest by sailing on a foreign voyage from Greenock, the messenger-at-arms of the court pursued her in a steam tug, with thirty men on board with him, overhauled the ship and compelled her crew to put her about and return to Greenock, where they proceeded to dismantle her. The petition to set aside the arrest, and the judgment thereon, are reported as *Carlberg v. Borjesson* (2). The President said: "What the messenger did, with the help of 30 men, was to capture the vessel. It is not possible to describe the affair in any other way. She was then brought into the harbor of Greenock as a prize. Such a proceeding on the part of a messenger-at-arms is outrageously illegal." Lord Deas said, "I greatly doubt if their was any illegality in bringing her back to the harbour, provided there was nothing objectionable in the mode in which that was gone about." And as to her being found within the channel of the river, and within the jurisdiction of the Court, he added: "If that be so, it is difficult to see why she might not be brought back from the open river, equally as if she had been seized at the mouth of, or immediately outside, the harbour." But he agreed that the mode of the arrest had been made "inimiously and oppressively." Other

(1) (1878), 3 A. C. 1316 and 1322. (2) (1877), 5 Ct. of Sessions Cas., 4th series, 188.

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judges made observations which were not applicable judicially to the case, the attention of the members of the court apparently not having been called to the expressions in the Merchant Shipping Act: "vessel being on, or lying, or passing off that coast, or being in, or near, that bay, channel, lake, river, or other navigable water," in s 685; or "person is found within the jurisdiction of any Court in Her Majesty's Dominions," in s. 685; or whenever any injury is done to the property of the Crown, or of a subject, by a foreign ship, and "that ship is found in any port, or river, of the United Kingdom, or within three miles of the coast thereof," a Judge may issue an order directed to the sheriff to detain the ship; or where "the ship in respect of which the application is to be made will have departed from the limits of the United Kingdom, or three miles from the coast thereof, the ship may be detained," etc., in s. 688, expressions which would apply to a vessel in motion and sailing on a voyage.

Lord Cairns, L. C., declined to commit himself to the opinions expressed by some of the Scotch Judges by saying: "I should be unwilling actually to decide, (it does not seem to me to be necessary to decide), whether the ship having sailed upon her voyage, and being in motion, it was competent to those who desired to execute the warrant to go on board her at all to serve the warrant of arrestment there. I rather infer from the language of some of the learned Judges in the Court of Session, that they doubted whether the ship could be served with the arrestment after she had thus commenced her voyage and was in motion. But, be that as it may, it appears to me, that the very utmost that could be done would be that those who got on board of her might affect the master, whatever might be the consequence of it, with the knowledge that an arrestment was there, and was served there on board the ship. But I can find no authority whatever which would justify them in turning the ship about and bringing her back into port."

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Lord Hatherley concurred in part, saying: "I am induced to come to this conclusion in the first instance, mainly because this is a question arising upon *a point of practice* of the Courts in Scotland, founded upon that extensive knowledge which the Judges must necessarily possess of the practice of their own Courts." And he added, "It is quite enough for us to say that we are not concluding that question" (turning the ship about and bringing her into port) in any way. There are modes of proceeding against persons who, neglecting, or despising, the orders of the Court, proceed to act contrary to the orders of which they have had notice, through means of a messenger. It may be that the messenger may have the power of nailing the warrant to to the mast, which is one mode of serving the order of arrest, of fixing thereby the person who has charge of the vessel, and who ventures afterwards to remove it upon his own authority, with a heavy responsibility. And there may be means of arriving at justice, if any injustice be done in the course of such procedure." And as to this, see the *Petrel* (1) and the *Nautik*, (2)

Those observations of the law lords leave the question open, with a leaning towards allowing services of the warrant of arrest upon the offending vessel while in motion and sailing upon her voyage, which apparently might be authorized by the sections of the Act above referred to. But in any event, the question before the Lords was, as stated by them, "purely and simply a question of practice" of the Scottish Courts, and one that might be held to be waved by taking a step in the cause, as the practice decisions governing such questions decide.

The rules of this court, as do the rules of the English and Scotch Courts, prescribe the modes by which service of the writ of summons on, and the warrant of arrest

(1) (1836) 3 Hagg. Ad. 299. (2) (1895) P. 121.

of, a ship may be made, (rules 10 and 41), by services "upon a ship * * * by attaching the writ (or warrant), for a short time to the main mast, or the single mast, or to some other conspicuous part of the ship, and by leaving a copy of the writ, (or warrant) attached thereto. And by rule 11." If access cannot be obtained to the property on which it is served, the writ (or warrant) may be served by showing it to any person appearing to be in charge of such property, and by leaving with him a copy of the writ (or warrant); "a formality which is as public as could be devised." See the *Parlement Belge* (1).

There can be no doubt that a *vi et armis* mode, or a force not sanctioned by law, such as was adopted by the messenger-at-arms and his 30 men in the case before the House of Lords, of capturing the ship "as a prize," and then dismantling her, was as stated by the Scottish judges, using the process of the court "nimiously and oppressively," and a proceeding that was "outrageously illegal."

No such *vi et armis* mode was adopted here.

A., the marshall's deputy was admitted, without protest, on board, and he served the writ and warrant as prescribed by the rules, and the master of the defendant ship submitted, and suggested Callam's Bay in which he would anchor his ship while under arrest; and he carried the messenger with him to that bay and voluntarily anchored there until bail was given and his ship released, thereby as I must find submitting himself and the ship to the jurisdiction of this Court.

The jurisdiction of the Admiralty Court over the cases of an arrest, or non-arrest, of a ship, was explained by Dr. Lushington in the *Volant* (2). "The damage confers no lien on the ship; but an arrest offers the greatest security for obtaining substantial justice in furnishing a

(1) [1880] 5 P. D. 218. (2) [1862] 1 W. Rob. p. 387.

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security for prompt and immediate payment." But where it was found impracticable to arrest the ship, he added: "I know of no reason why an action could not be maintained in this Court, although the ship could not be arrested. The jurisdiction of this Court does not depend upon the existence of a ship, but upon the origin of the question to be decided, and the locality." "Where there is an appearance to the action, and bail given, as to the bail, the action cannot be extended beyond what they (the owners), who are strangers to the cause, have voluntarily made themselves responsible for."

In the *Johann Friederich*, (1) where both of the colliding vessels were the properties of foreign subjects, and an appearance under protest to the jurisdiction had been entered, Dr. Lushington in commenting on the alleged unusual course adopted by the Courts, thus explained the enalogy between the law of arrest in Admiralty Courts, and the law of Foreign Attachment, in the ordinary Civil Courts; "But, admitting this to be true, analogous cases exist, as in that of Foreign Attachment, in which the property of foreigners may be attached in order to compel an appearance, or to secure bail to the action. And if such a process is open to the foreigner in that case, it is difficult to understand the ground of disputing the jurisdiction of this Court in this instance" p. 37.

Under the law of Foreign Attachment, the right of a plaintiff to attach the goods of his debtor, while *in transitu*, in recognized as part of that law. Thus where goods had been shipped to a factor for sale to liquidate advances which he had made to the shipper, and to hold the balance of such sale subject to the shipper's control, it was held that the factor had acquired no right of property in them, nor could until they actually came into his possession; and that the plaintiff had the right to attach such goods

(1) (1839) 1 W. Rob. 35.

while *in transitu* on board a vessel. *Bonner* v. *Marsh* (1) *Dickman* v. *Williams*, (2) Drake on Attachment (3).

The defence further objects to the premature issue of the writ of summons, and of the warrant of arrest, on the 25th July 1907, when the defendant ship was not then within Canadian waters, and the jurisdiction of this Court. And the notice of motion asks for an "Order that the writ of summons, the service thereof, and the warrant to arrest the said ship, and the seizure thereof under the said warrant be set aside".

The mode of the service of the writ of summons, and of the seizure of the ship under the warrant of arrest, is stated in the affidavits filed by both parties, and have been quoted above, and also in the oral examination of the Deputy Marshal, Laporte; and they give fuller details than were disclosed to the Supreme Court in the *D. C. Whitney* case. The main objections to the writ and warrant are based on section 18 of the Admiralty Act 1906, cap. 141, which provides that: "Any suit may be instituted in any Registry, when the ship or property, the subject of the suit, is at the time of the institution of the suit, within the district, or division, of such Registry".

This clause is classed under the title of "procedure" and by virtue of the auxiliary verb "may" the clause is to be read as permissive, and not as imperative. Interpretation Act, S. 34, sub. 24, "May" means "to have liberty, leave, licence, or permission; to be permitted to be allowed.' A man may do what the laws permit: "Webster's Dictionary, see also the observations of Gwynne, J., in *Bernardin* v. *North Dufferin* (4). The clause may also be classed as "directory:" and as to such, Lord Mansfield, C. J., in *Rex.* v. *Loxdale*, (5) said: "there is a known distinction between circumstances which are of the essence

(1) (1848) 10 S & M (Miss), 376.
(2) (1874), 50 Miss. 500.
(3) (7th Ed.) par. 246.
(4) (1891) 19 S. C. R. at p. 618.
(5) (1758) 1 Burr. p. 447.

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of a thing required to be done by an Act of Parliament, and clauses merely directory. The precise time in many cases is not of the essence." And in *Rex* v. *Justices of Leicester* (1) a case where the Quarter Sessions had not been held at the statutory time. viz.; the week after the 10th October, Lord Tenderden, C. J., held that the statute was merely direotory, that Sessions could, notwithstanding the enactment, be legally holden at another time; adopting Lord Hale's dictum in 2 Hale's Pleas of the Crown, p. 30. In *Danaher* v. *Peters*, (2) where a statute required that applications for licenses should be considered at a meeting of the municipal council to be held not later than the first day of April in each and every year; but the Mayor gave notice, and received applications, for licenses on the 26th April,—Patterson, J., said: "I am satisfied that the reference to time in s. 27, (1st April), cannot be properly treated as otherwise than directory, so that, even if the provisions of that section apply to the Mayor of St. John in the same way as to a Municipal Council, the adjudication of the applications for licenses on the 25th April was good and valid." See further *Morgan* v. *Perry*, (3)

And further as to this premature issue of process—I may quote what Lord Stowell said in the case of the premature seizure of a ship, which involved weightier consequences: "The seizure was perhaps premature; but shall the Court on that account,—the time for payment having long since arrived,—compel the parties to relinquish these proceedings, seek another jurisdiction, and begin again *de novo?* What advantage would be derived? *Cui bono*, should I occasion so much delay and expense?" The *Jane*. (4)

The issue of the writ of summons and of the warrant of arrest are, under the statute, matters of procedure, and

(1) (1827), 7 B. & C, 12.
(2) (1889), 17 S. C. R., 44.
(3) (1855), 17 C. B. 334.
(4) (1814), 1 Dobs. 461.

not of jurisdiction, and may be affected by such proceeding on the part of the litigant objecting to such matters of procedure, as may bring him within the rules as to estoppel or waiver. These terms, though not technically identical, are so nearly allied, and so similar in the results which follow their application, that they are often used indiscriminately. And in this case, the defendant ship, by having voluntarily anchored in Callam's Bay, and by the owners submitting to the jurisdiction of the Court, (see the *Dundee*, 1 Hagg. Ad. p. 110) by giving a bond, without any reservation or protest, in which their sureties "jointly and severally submit themselves to the jurisdiction of the said Court," and consent if the owners make default, that execution may issue against them; and obtain thereby a release of their ship, have waived any irregularity in the procedure, affecting the issues of the writ and warrant. The bond now represents the ship, and the giving of it, after appearance under protest, with the special conditions above cited, was a step in the cause. Chitty's Archbold Vol. 2 p. 1399, says; "If any necessary proceedings on the part of the plaintiff be not had within the time limited for it, or be had before the time appointed for it, by the practice of the Court, it may be set aside for irregularity. "If the party complains of an irregularity, take a fresh step in the action, after acknowledge of it, he cannot apply to set aside the irregular proceeding, or otherwise take advantage of it. Therefore by entering an appearance the defendant waives any irregularity in the process. So, by pleading, the defendant waives any irregularity in the declaration." Ibid. p. 1402. In this case after entering "an appearance under protest," and instead of promptly moving against the alleged irregularity, the defendant ship-owners, ten days afterwards, took a step in the cause by giving the bond, with the condition of submission to the jurisdiction of the Court as above specified, they by first reprobating, and

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then approbating, the jurisdiction, must be held to be estopped from now impeaching its jurisdiction.

The Canadian cases which may be referred to on this point are *Racey* v. *Carman* (1), where Robinson, C. J. held that where an affidavit to hold to bail was irregular, but the defendant put in special bail, he thereby waived the irregularity. See further *Herr* v. *Douglas* (2), and *Smith* v. *Smith* (3). So in the United States, where defendants, on being arrested, offered bail to the plaintiff's attorney, and induced him to examine and accept the bail, by which means the defendants procured their release, this was held to be an act on the part of the defendants which assumed that it was proper to require bail of them, amounted to a waiver of any objection of their having been held to bail; *Dale* v. *Radcliff* (4). And in *Brymer* v. *Atkins* (5), a case from a Colonial Vice-Admiralty Court, it was said: "The security given in Admiralty is no more than an undertaking to submit to the directions of the Court" "Operating therefore as a stipulation, execution of it belongs to that court, and that jurisdiction to which the parties have agreed to submit"; (p. 189) see also note (*a*) 3 Hagg. Ad. 431.

I find, therefore, that the giving of a bond, in which the sureties, on behalf of the owners of the defendant ship, submit themselves to the jurisdiction of the Court, and consent as therein set forth, (form No. 17); and which, being given after the appearance under protest, was a step in the cause, and thereby a waiver of the protest.

Besides, the other facts proved and proceedings in this case, and the law applicable to them as detailed above, show clearly marked distinctions between it and the *D. C. Whitney Case* (6); and I must therefore hold that this

(1) [1857] 3 U. C. L. J. 207.
(2) 4 Ont. P.R. 102.
(3) [1868] Ibid. 354.
(4) [1857] 25 Barb. (N.Y.) 333.
(5) [1789] 1 H. Black, 164.
(6) 38 S. C. R. 303.

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Court has jurisdiction to adjudicate upon the questions at issue between the parties, and that the motion to set aside the writ of summons, the warrant to arrest the ship, and the seizure thereof under the said warrant, should be dismissed with costs in the cause to the plaintiffs in any event.

Franklin A. Hough (Amherstburg) : Solicitor for plaintiff.

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